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AIR & RADIATION LAW NEWS FOR OCTOBER 19, 2012

HIGHLIGHTS

Air Pollution

Advisers Say EPA Has 'Strong Rationale'
For Considering Tougher Ozone Standard

The Environmental Protection Agency has provided a "strong rationale" for considering setting ozone air quality standards at 60 parts per billion or 70 ppb, but would be justified in considering standards that are even stricter,...

Climate Change

EU Carbon Trading System Cut Emissions
At Minimal Cost to Economy, Study Says

The European Union has made significant cuts in its greenhouse gas emissions using a cap-and-trade approach while keeping the cost low, the Environmental Defense Fund said in a report released Oct. 17. ...

Drilling

Gas Drilling in Pennsylvania, Impaired Health Linked

PHILADELPHIA—A survey of 108 people in 14 Pennsylvania counties where Marcellus Shale gas resources are being developed shows "a clear pattern of negative health impacts associated with living near gas facilities,"...

Energy

Clean Energy Industry Ponders Future
With Expiration of Tax Credits, Incentives

The renewable energy industry is preparing for a "fiscal cliff" of its own as billions of dollars in tax credits and other incentives are scheduled to expire at the end of 2012, speakers at the American Council on Renewable Energy's...

Energy

FERC Reaffirms Transmission Rule
Despite Concerns From Electric Industry

The Federal Energy Regulatory Commission reaffirmed Oct. 18 its far-reaching electricity transmission planning rule and denied requests for rehearing, which moves the process a step closer to legal action by the electric industry that...

Enforcement

Clean Air Act Blocks Putative Class Action
By Neighbors of GenOn Coal-Fired Power Plant

Neighbors of a coal-fired power plant may not seek monetary damages and injunctive relief for damage the plant allegedly caused to their property under common law tort theories because the Clean Air Act preempts their claims, a federal court...

General Policy

Secretary Clinton Calls for Active U.S. Role
To Address Energy, Environmental Challenges

Secretary of State Hillary Clinton said Oct. 18 the United States should be actively involved in energy and environmental issues around the world to advance economic development and political stability....

Inhofe Says Post-Election EPA Rules Will Shutter Fossil Fuel Production

Sen. James Inhofe (R-OK) is accusing EPA of intentionally delaying a slew of rules until after the election so that the Obama administration can skirt accusations that it is seeking to shutter fossil fuel production and associated economic pain before voters go to the polls Nov. 6 to choose between President Obama and Gov. Mitt Romney.

GOP Blames EPA For Coal Sector Losses But New Study Tags Gas Prices

Republican candidates are stepping up their campaigns blaming EPA and its rules for contractions in the coal sector, a key employer in many swing states, despite recent findings showing that low natural gas prices are more likely to blame for the job losses than EPA rules.

EPA Delays Near-Road NO2 Monitoring Network, Citing Funding Constraints

EPA is proposing to delay its Jan. 1 deadline for states to launch a first-time near-road air quality monitoring network for its nitrogen dioxide (NO2) air standard, citing a lack of federal and state funding to pay for the network and suggesting an alternate approach that could delay the launch of some monitors until January 2017.

EPA Sets Deadline To Decide Whether To Revise 'Exceptional Events' Rule

EPA has set a self-imposed target of deciding by the end of the year whether to revise its contested rule on when states can exempt emissions from "exceptional events" such as wildfires from counting toward compliance with the Clean Air Act, possibly signaling a policy shift as the agency has not appeared to consider revising the rule.

Latest Blogs

Citizens' Coalition Pitches 100-Day Energy Plan

A new coalition of environmentalists, public interest groups and other citizen organizations is pitching a 100-day clean energy agenda for the victor in November's presidential . . .

CALIFORNIA:

Regulators to consider price limits on GHG allowances

Debra Kahn, E&E reporter

Published: Thursday, October 18, 2012

SACRAMENTO, Calif. -- Citing concerns about the economic effect of their greenhouse gas cap-and-trade system, California regulators are considering ways to limit the price of allowances from going above a predetermined level.

The California Air Resources Board unanimously voted today to figure out methods to keep allowance prices at the highest level of the system's "Price Containment Reserve," a small set-aside of allowances to be released into auctions held separately from the general auctions.

For 2013, the starting price of the reserve allowances is \$40 per ton, increasing to a maximum of \$50; prices will increase each year by 5 percent plus inflation.

The resolution gives staff until mid-2013 to come up with the proposal; the first auction of allowances to businesses that emit more than 25,000 tons of carbon dioxide equivalent per year will take place next month.

Board Chairwoman Mary Nichols said the resolution, which also included guidance on how companies can avoid illegally sending emissions out of state through normal business activities, would help economic competitiveness.

"It's ... important to recognize that, as our governor has reminded us from time to time, that we need to be moving towards our greenhouse reduction goals in ways that also benefit consumers in California, and that help to make sure that we're going to fulfill the promise of A.B. 32 that California businesses and industries and manufacturers will not only remain competitive but in fact become more competitive," she said.

A group of nearly 200 businesses have been lobbying for more free allowances or a delay in the regulations to keep prices down (Greenwire, Oct. 18). They wrote a letter to Gov. Jerry Brown (D) on Tuesday asking him to intervene. "The prospect of high cap-and-trade auction costs in California is influencing decisions that will have long-term negative consequences for California," said the A.B. 32 Implementation Group.

Environmentalists cautioned regulators that a straight price cap might not be needed. "We've completed economic modeling that shows the many price containment mechanisms that are already in the program will almost certainly keep prices in check," said Erica Morehouse, an attorney with the Environmental Defense Fund. Other ideas should be explored first, she said, including the possibility of holding more frequent auctions to stabilize prices. The system already has a number of cost-controlling features, she said, including offsets, three-year compliance periods, and the ability to buy allowances and hold them for later.

Jasmin Ansar, a climate economist with the Union of Concerned Scientists, said the resolution seemed reasonable. "Officials are developing a proposal to set a maximum price on carbon allowances (under a reasonable range of plausible conditions) to optimize the success of the cap-and-trade program and provide greater market certainty," she said.

Business representatives, however, weren't mollified. The resolution "is really insufficient," said Dorothy Rothrock, co-chair of the A.B. 32 Implementation Group, which sent the letter to Brown.

EPA:

Inhofe says Obama plans post-election 'regulatory onslaught'

Emily Yehle, E&E reporter

Published: Thursday, October 18, 2012

Republicans on the Senate Environment and Public Works Committee released a report today that accuses President Obama of delaying environmental regulations until after the presidential election to avoid a backlash from voters.

The report rehashes about a dozen U.S. EPA rules that Republicans love to hate, including greenhouse gas regulations for power plants and the ozone rule that Obama delayed last year. All would "spell doom" for jobs, according to Oklahoma Sen. James Inhofe, the panel's top Republican.

"President Obama has spent the past year punting on a slew of job-killing EPA regulations that will destroy millions of American jobs and cause energy prices to skyrocket even more," Inhofe said in a statement. "From greenhouse gas regulations to water guidance to the tightening of the ozone standard, the Obama-EPA has delayed the implementation of rule after rule because they don't want all those pink slips and price spikes to hit until after the election."

It's a somewhat new angle from Republicans, who have spent the past few years criticizing Obama for issuing too many expensive regulations that they say kill jobs. Environmental groups, on the other hand, have accused the White House of holding up important rules in the Office of Information and Regulatory Affairs.

But in the report, Republicans characterize the Obama administration as a vehicle for the "radical environmental left," with EPA officials waiting to fully pursue their anti-fossil-fuel agenda until after the election. Among the report's list of upcoming regulations, the agency's boiler MACT makes the cut, as does the federal government's efforts to regulate hydraulic fracturing.

Such rules would create a "regulatory onslaught that will drive up energy prices, destroy millions of jobs, and further weaken the economy," the report states.

An EPA spokeswoman declined to comment.

URANIUM:

Lawmakers urge new plan for Navajo cleanups

Manuel Quinones, E&E reporter

Published: Thursday, October 18, 2012

A group of Democratic House lawmakers asked several federal agencies today to extend their coordinated effort aimed at cleaning up the legacy of uranium mining in the Navajo Nation.

The current five year plan, developed after pressure from Congress, is scheduled to wrap up by the end of this year. While major mine sites have been cleaned up, hundreds remain.

"Although the last operating mines on the Navajo Nation closed in the mid-1980s, mining activities on the Reservation left behind hundreds of abandoned uranium mines, inactive milling sites, former dump sites, contaminated groundwater, and structures that contain elevated levels of radiation," wrote Democratic Reps. Ed Markey of Massachusetts and Henry Waxman of California, among others.

The five year plan marked the first time different federal agencies, including U.S. EPA and the Bureau of Indian Affairs, significantly pooled resources to reclaim the old mine sites, many of them the product of Cold War-era mining for nuclear weapons (Greenwire, Dec. 13, 2011). Obama administration officials have indicated that an extension is likely.

In August, a similar array of lawmakers asked the Centers for Disease Control and Prevention for an update on an ongoing study dealing with the effects of pollution on the Navajo. Now, they're also asking the Government Accountability Office to audit the cleanup effort.

They wrote that "due to widespread damage inflicted on Navajo Lands, a tremendous amount of work remains to be done. We believe that a second Five Year Plan will be necessary to continue this enormous task."

[Click here to read the lawmakers' letter.](#)

EPA:

Connaughton seen as early front-runner to head agency if Romney is elected

Jeremy P. Jacobs and Jean Chemnick, E&E reporters

Published: Thursday, October 18, 2012

Republican presidential nominee Mitt Romney has cast U.S. EPA as a menace to energy jobs in campaign stops across the country, and with the race now a tossup, speculation is mounting over whom he might tap to lead the agency if he defeats President Obama next month.

The former Massachusetts governor made no bones about his support for oil, coal and natural gas at Tuesday night's debate, charging his opponent with allowing EPA to persecute producers of fossil fuels while avoiding any discussion of air quality.

"I was in coal country," he said, in response to a question on gas prices. "People grabbed my arms and said, 'Please save my job.' The head of the EPA said, 'You can't build a coal plant. ... It's virtually impossible given our regulations.' When the president ran for office, he said if you build a coal plant, you can go ahead, but you'll go bankrupt. That's not the right course for America."

The prominence Romney has given EPA on the campaign trail has aroused interest in who he would pick to replace Lisa Jackson as administrator.

A President-elect Romney would likely look for Cabinet members who have experience in the government as well as management credentials in the private sector, according to sources with knowledge of the Romney transition team's thinking. The top-level spots may be more political, while deputies will likely have lengthy resumes within the government or their respective industries.

Kenneth Green, a scholar at the American Enterprise Institute, said any new president hopes for "plug and play" Cabinet members who are already familiar with Washington, and who have the connections to quickly assemble a capable staff. Add to that the ability to gain Senate confirmation and "that makes for a short list," he said.

So far, most of the discussion among EPA observers has focused on two names: James Connaughton, who led the White House Council on Environmental Quality during George W. Bush's administration, and Jeff Holmstead, Bush's EPA air chief.

"I think there is likely to be a very strong bias toward people with immediate and direct experience," said Mike McKenna, a Republican energy strategist. "That means a lot of names from the Bush administration are going to emerge."

Connaughton, now an executive at Baltimore-based Constellation Energy, appears to be the front-runner and is well-liked in most Republican circles. He has been advising the Romney campaign on environmental issues and is considered extremely qualified for the job. Those who have worked with him in the past characterized him as a wonk who is "head and shoulders above" many in the industry when it comes to environmental policy.

"He'd be a great pick," said Frank Maisano of the legal and lobbying firm Bracewell & Giuliani, and "he's a strong supporter of the Romney folks."

Connaughton declined to comment for this article.

He does, however, also have some baggage that could prove problematic in the confirmation process, particularly in satisfying the GOP's conservative tea party wing.

For example, Connaughton has defended his work to address climate change while at CEQ, which included efforts to facilitate the transfer of low-carbon technology between countries.

Green noted that Connaughton and his team were criticized by some conservatives for "being willing to go along with heavier-handed regulation than they had to."

Connaughton has also praised some aspects of Obama's approach to energy in the early days of the president's administration. "Overall, I am encouraged by the Obama administration's approach to energy policy," he said in an October 2009 interview with *National Review*. In particular, he agreed with EPA's stance that addressing climate change is best done through legislation, instead of regulation.

Since then, Democrats have failed in their push to pass a carbon dioxide cap-and-trade bill, and EPA has begun to promulgate greenhouse gas rules for high-emitting sectors beginning with power plants.

Connaughton has said he also favors a cap-and-trade system, noting that such a program has previously worked in reducing sulfur dioxide emissions that cause acid rain and nitrogen oxide emissions that cause smog. But he added that the legislation to create such a system should include cost consideration to assure policymakers the program won't get out of control (*E&ENews* PM, Nov. 16, 2011).

Such positions have already earned some criticism from climate change skeptics (*Greenwire*, May 22).

Additionally, Connaughton's current company has been vocal in its support of EPA's recent power plant air regulations, including its standards for mercury and other air toxics that Romney has criticized on the stump.

Romney has even endorsed Sen. James Inhofe's (R-Okla.) bid earlier this year to use the Congressional Review Act to kill the rule outright, something one longtime Washington observer said was an unusual move. Presidential candidates usually try to remain above the fray when it comes to these types of policy battles, the observer said.

McKenna said combining those elements could create hurdles for Connaughton.

"He'd have a lot of trouble getting confirmed," McKenna said, adding that Connaughton would be a "great" administrator. "He's been arguing for everything the Republican caucus hates."

"I think that the [Romney] campaign has been pretty upfront in saying what they really want is someone who can eliminate a lot of the regulatory burdens that the Obama administration has placed on people who want to build things," said the Washington observer, adding, "I don't see them going with someone like Christine Todd Whitman."

Whitman, Bush's first EPA administrator, was regarded as a moderate on climate and regulatory issues and has since criticized Republican use of anti-EPA rhetoric.

The apparent runner-up in the pre-election whisper polls is Holmstead, a Bush-era assistant EPA administrator for air and radiation.

Now a partner at Bracewell & Giuliani, Holmstead has represented coal-fired electric utilities and other industry clients that Romney has praised as job creators. He declined to comment for this article.

Other former Bush administration officials that have been mentioned include Ann Klee, a former EPA general counsel. Klee, who has since worked for General Electric Co., has also spent time at the Interior Department.

Observers also suggested that Rebecca Rosen, a current adviser to the Romney campaign on energy and environmental issues, will have a role either at EPA or in the White House. Some say she could be first in line for deputy assistant for energy and climate change, a post currently filled by Heather Zichal. Rosen formerly worked for Sen. Lisa Murkowski (R-Alaska) and has also worked at PFC Energy.

Poach from the states?

Some observers suggested Romney could turn to the states for an EPA chief, a move that would likely satisfy frequent critics of the agency and Washington bureaucracy.

Top contenders would include Kathleen Hartnett White, a former chairwoman of the Texas Commission on Environmental Quality. White is now director of the Armstrong Center for Energy and the Environment at the Texas Public Policy Foundation.

White has a long track record in Texas, including as an appointee to the Texas Water Development Board, and has been a frequent critic of EPA air regulations, including the Cross-State Air Pollution Rule (CSAPR) that Texas and other states successfully challenged in federal court.

Another option could be Joseph Kelliher, a Bush-era chairman of the Federal Energy Regulatory Commission who went on to Florida Power & Light Co.

The Washington observer also suggested that Romney could send a strong signal about the direction he wanted to take his EPA in by nominating Texas Attorney General Greg Abbott (R), who has mounted court challenges against several EPA rules, including for ozone emissions.

But Bill Becker, executive director of the National Association of Clean Air Agencies, said there are some risks associated with picking an administrator that EPA's career staff will view as hostile to their work.

"If Mitt Romney were elected president, he might select an administrator who does not have a previous track record of suing EPA at every turn," Becker said, "or alienating the 10,000 staff who have worked at the agency for their entire careers."

Environmentalists and public health advocates are likely to find flaws in any Romney pick. Some even questioned why the job would be desirable.

"Would anyone," asked Frank O'Donnell of Clean Air Watch, "really want to head up EPA under Romney the way he has talked during this campaign?"

Democratic senators must assent

Besides wooing anti-regulatory Republicans, any Romney nominee must also get the nod from some Democratic senators in order to be confirmed, AEI's Green noted. And if Democrats wake up Nov. 7 to discover they have no prospect of moving environmental legislation in the new Congress, they will become that much more reluctant to approve a staunch opponent of environmental protection who might test the legal limits of deregulation, he said.

But Green said the tone of the campaign and a Romney victory might also persuade Senate Democrats that the American people are not nearly as interested in environmental safeguards as in economic development, encouraging them not to stage a huge fight over any EPA nominee.

"If he wins a significant victory running on a platform of saying 'I want oil, I want coal, I want natural gas, I want them now and I want them here,' and he doesn't discuss environmental protection or climate change, it's going to change the color by which his nominees are evaluated during confirmation, I would think," Green said.

Ultimately, Romney's pick may have little influence on EPA policy, argued Jerry Taylor of the libertarian Cato Institute. Taylor suggested that the White House typically sets the regulatory agenda and for all his bluster on EPA regulations, Romney would like to preside over a "status quo" EPA that "tackles issues that come down the pipe," since the agency was forced to issue most of its controversial regulations by court order.

"You can't roll those back unless Congress changes the law," Taylor said, referring to the mercury air standards.

Green sounded the same note. "Whoever's appointed administrator to the EPA comes in facing huge legislative and judicial constraints," he said. Rules are generally reviewed according to a certain schedule, with guidelines set by a panel of science experts. The administrator's discretion is limited.

"The law tends to drive the process," he said.

Which is why, Green said, Romney and his team might be showing some interest in a tax swap involving a carbon tax. EPA is on track to regulate carbon emissions from large sources anyway.

If a carbon tax is enacted, a future EPA administrator could decide that it satisfies EPA's obligations to limit carbon under the Clean Air Act.

"The carbon rules could be pulled back, but only in exchange for something else," Green said.

CALIFORNIA:

Business group asks Gov. Brown to delay cap and trade

Anne C. Mulkern and Debra Kahn, E&E reporters

Published: Thursday, October 18, 2012

A business coalition has appealed to California's governor to delay the state's pending cap-and-trade program, arguing that without adjustments it will hobble the economy.

The A.B. 32 Implementation Group -- which represents nearly 200 companies and trade associations -- on Monday sent Gov. Jerry Brown (D) a letter urging intervention. It arrived as the California Air Resources Board (ARB) finalizes plans for cap and trade. The agency meets today in Sacramento, its last planned session before the Golden State holds its inaugural auction of carbon allowances on Nov. 14.

The business coalition wants the state to give allowances away, asserting that the cap on emissions by itself would be enough to reduce greenhouse gas levels. Companies required to submit permits for greenhouse gas emissions need help adjusting to a lower-carbon economy, the group said.

"CARB's requirement to buy allowances will impose high and unnecessary costs on California businesses, threatening jobs and tax revenues in the state," the group's letter said. "All California's consumers will feel the impacts of higher costs for fuel, utilities, food and other essential goods and services. This is an urgent problem that needs to be addressed immediately."

The coalition is reaching out to Brown because ARB has been "dismissive" of the Implementation Group's ideas, said Executive

Director Shelly Sullivan. The state's climate law, A.B. 32, allows the governor to intervene if there is the "threat of significant economic harm."

Neither ARB nor Brown's office immediately responded to requests for comment. ARB Chairwoman Mary Nichols said Tuesday, however, that parts of the state's climate law will face continued opposition.

"There are, I expect, going to be legal challenges at every step of the way to California's forward progress in trying to take action on climate change, because we are the first state in the country to implement a full program," Nichols said after a San Francisco appellate court hearing on the state's low-carbon fuel standard. "Obviously, we're hopeful that at some point in the not-too-distant future, the rest of the country will see fit to take action."

California's market-based programs will "create incentives for businesses that have cleaner, lower-carbon products," Nichols said. "We believe there are advantages to California from being a first mover in this area," Nichols said, "that we're going to see investments in California by companies that want to be part of selling lower-carbon fuels in California."

Nichols last month chastised businesses for dragging their heels on cap and trade. While the industrial sector says that it supports A.B. 32, Nichols said, "there has not been a single measure we've come up with so far at least that they've been in favor of."

Yesterday, a different coalition of businesses rallied behind cap and trade in response to the letter from the A.B. 32 Implementation Group. The California Business Alliance for a Green Economy also sent Brown a letter.

"Let's get going," it said in capital letters. "We are California business owners and leaders who support the state's clean energy policies. AB 32 has been the law of the land for six years. There have been dozens of public hearings and workshops, and tens of thousands of public comments submitted. Uncertainty is bad for business. Stop the debate and start the program."

AIR POLLUTION:

Miss. Supreme Court to hear gasoline fumes case

Published: Thursday, October 18, 2012

The Mississippi Supreme Court in December will hear the appeal of a case in which five women accused oil company Texaco Inc. of being responsible for their children's disabilities and illnesses.

The women claimed they were pregnant while working in an office building in Fayette, Miss., which previously was a gas station affiliated with Texaco. They sued the company, which is now a part of Chevron Corp., saying they had been exposed to leaded gasoline fumes from tanks left in the ground.

A Hinds County, Miss., jury ruled in favor of the women in 2010, awarding them \$19 million. Texaco appealed the verdict.

Lorraine Simon, lead plaintiff in the case, testified that her 20-year-old daughter was severely mentally disabled. The defense's expert testified that Simon was exposed to 46,000 times the safe level of exposure for leaded gasoline fumes.

The other women's children do not have mental disabilities, but they all suffer from asthma. Attorneys also argued that they have some learning disabilities (AP/Fuel Fix, Oct. 18). -- JE

ClimateWire -- Fri., October 19, 2012 -- Read the full edition

1. AFRICA: Clean energy deal lights up a power-hungry nation

JINJA, Uganda -- The path to Uganda's energy security begins 50 miles east of the capital, Kampala, with a left turn off the main highway and a scattering of chickens and goats to the safety of their roadside keeps. The diesel Toyota minivan groans 5 miles north up the Victoria Nile floodplain, passing the red-dirt villages of eastern Mukono District before arriving at a fenced compound high above the river. Here, under the watch of Ugandan national police, the new Bujagali Hydropower Plant is converting the Nile's powerful current into 250 megawatts of electricity, enough to provide 24/7 power to Kampala and a smattering of smaller cities and villages linked to the nation's power grid.

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11. NATIONS: South Korea may tax energy based on emissions

12. CITIES: Boulder County, Colo., draws up blueprint to fight climate change

EnergyWire -- Fri., October 19, 2012 -- Read the full edition

1. NATURAL GAS: While Utica Shale's early birds celebrate, others wait

CANTON, Ohio -- Ron's Workingman's Store had been a small, durable business here for nearly 75 years, serving eastern Ohio's industrial workers. And then Chesapeake Energy Corp. moved in across the street last year, as the Oklahoma firm made its foray into the Utica Shale gas development. "We created a great friendship, and a lot of their subcontractors came over here," said the

store's purchasing manager, Lisa Nicodemo. Sales of fire-retardant clothing used in drilling operations spiked, along with business at the company's companion store, Wilkof Industrial Supply, handling industrial equipment and tools.

THIS MORNING'S STORIES

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